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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10
11 UNITED STATES OF AMERICA, } Case No. 10CR5016-H
12 } Plaintiff,
13 } v.
14 PHILIP JOHN CASTAGNOLA (14), } ORDER DENYING MOTION TO
15 } REDUCE SENTENCE
16 } UNDER 18 U.S.C. § 3582(c)(2)
 }
17

18 On April 14, 2015, Defendant Philip John Castagnola (“Defendant”) filed,
19 through his previously appointed defense attorney Merle N. Schneidewind, a joint
20 motion with the concurrence of the Government to reduce his sentence under 18 U.S.C.
21 § 3582(c)(2) based on Amendment 782 to the United States Sentencing Guidelines
22 (“U.S.S.G.”) as promulgated by the United States Sentencing Commission. (Doc. No.
23 1545.)

24 On April 17, 2015, the Court issued an Order to Show Cause (“OSC”) why the
25 Court should not deny the joint motion to reduce the Defendant’s sentence based on the
26 limitation in U.S.S.G. § 1B1.10(b)(2)(A), since the Court made two departures in the
27 Defendant’s original sentence. (Doc. No. 1546.) The Court imposed a custodial
28 sentence of 87 months after departing downward one level based on the parties’ joint

1 recommendation¹ (Doc. Nos. 859 and 1073) and departing downward one additional
 2 level under United States v. Cook, 938 F.2d 149 (9th Cir. 1991) and Koon v. United
 3 States, 518 U.S. 81 (1996) for a combination of factors under U.S.S.G § 5K2.0. (See
 4 generally Doc. Nos. 1123 and 1125.)

5 On April 21, 2015, the Defendant responded to the OSC. (Doc. No. 1547.) The
 6 Defendant argues that that the purpose of the one-level “fast-track” departure under
 7 § 5K3.1 was to “account for time served of 245 actual days in custody in a related state
 8 case (SCD231394)” and that “[u]nder the sentencing guidelines § 5G1.3(b), the Court
 9 may depart downward” to account for the time the Defendant served in state custody.
 10 (Id. at pg. 4.) Furthermore, the Defendant asserts that “[c]ounsel has used the term ‘fast
 11 track’ for the departure when in fact it was a departure under 5G1.3.” Id. The Defendant
 12 did not address the Court’s additional § 5K2.0 departure under Cook and Koon.

13 In response to the Court’s OSC, the Government now opposes the motion to
 14 reduce the Defendant’s sentence, arguing that “[b]ecause these departure were not
 15 related to substantial assistance, then under § 1B1.10, they do not carry over to the new,
 16 amended, guideline calculation” and “[t]herefore, under §1B1.10(b), Defendant is not
 17 entitled to any further reductions, and the Court should deny his motion.” (Doc. No.
 18 1554 at pg. 7.) The Court agrees with the Government.

19 The Court turns to the applicable Guideline language and law to evaluate the
 20 motion for a sentence reduction under § 3582(c)(2). U.S.S.G. § 1B1.10(b)(1) (Nov. 1,
 21 2014) provides that:

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 23 In determining whether, and to what extent, a reduction in the defendant’s
 24 term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy
 25 statement is warranted, the court shall determine the amended guideline
 26 range that would have been applicable to the defendant if the
 27 amendment(s) to the guidelines listed in subsection (d) had been in effect

28 ¹ The Defendant’s sentencing summary chart classified the downward departure as a “fast-
 29 track” departure under 5K3.1. (Doc. No. 1073.) However, the reason for the departure request was to
 account for the time the Defendant served in state custody. (See Plea Agreement, Doc. No 710 at pg.
 9.)

1 at the time the defendant was sentenced. In making such determination, the
 2 court shall substitute only the amendments listed in subsection (d) for the
 3 corresponding guideline provisions that were applied when the defendant
 4 was sentenced and shall leave all other guideline application decisions
 unaffected.²

5 Additionally, “the court shall not reduce the defendant’s term of imprisonment
 6 under 18 U.S.C. § 3582(c)(2) and this policy statement to a term that is less than the
 7 minimum of the amended guideline range determined under subdivision (1) of this
 8 subsection.” U.S.S.G. § 1B1.10(b)(2)(A) (Nov. 1, 2014). The commentary to § 1B1.10
 9 clarifies that the “[e]ligibility for consideration under 18 U.S.C. § 3582(c)(2) is
 10 triggered only by an amendment listed in subsection (d) that lowers the applicable
 11 guideline range (i.e., the guideline range that corresponds to the offense level and
 12 criminal history category determined pursuant to §1B1.1(a), which is determined before
 13 consideration of any departure provision in the Guidelines Manual or any variance).”
 14 U.S.S.G. § 1B1.10 cmt. n.1(A) (Nov. 1, 2014).

15 An exception exists under U.S.S.G. § 1B1.10(b)(2)(B) (Nov. 1, 2014) if a
 16 defendant was sentenced below the Guideline range pursuant to a government motion
 17 reflecting a defendant’s substantial assistance under U.S.S.G. § 5K1.1 (at the time of
 18 sentencing) or under Fed. R. Crim. P. 35(b) (post-sentencing).

19 In Dillon v. United States, 130 S. Ct. 2683, 2691 (2010), the Supreme Court
 20 explained the limited nature of the § 3582(c)(2) proceedings and the process for ruling
 21 on motions to reduce sentences under that section.

22 Consistent with the limited nature of §3582(c)(2) proceedings,
 23 §1B1.10(b)(2) also confines the extent of the reduction authorized. Courts
 24 generally may “not reduce the defendant’s term of imprisonment under 18
 25 U. S. C. §3582(c)(2) . . . to a term that is less than the minimum of the
 26 amended guideline range” produced by the substitution. §1B1.10(b)(2)(A).
 Only if the sentencing court originally imposed a term of imprisonment

27 ² Amendment 782 to the U.S.S.G. has been added to subsection (d), making the application of
 28 Amendment 782 retroactive to sentences imposed prior to its promulgation by the Sentencing
 Commission. U.S.S.G. § 1B1.10(d) (Nov. 1, 2014).

1 below the Guidelines range does §1B1.10 authorize a court proceeding
 2 under §3582(c)(2) to impose a term “comparably” below the amended
 3 range. §1B1.10(b)(2)(B).

4 In Dillon, the Supreme Court required district courts to follow a two-step process
 5 in ruling on motions under § 3582(c)(2). The Supreme Court cautioned that
 6 “[f]ollowing this two-step approach, a district court proceeding under §3582(c)(2) does
 7 not impose a new sentence in the usual sense.” Id. Furthermore, “proceedings under 18
 8 U.S.C. § 3582(c)(2) and this policy statement do not constitute a full resentencing of
 9 the defendant.” U.S.S.G. § 1B1.10(a)(3). The two-step process provided by Dillon, 130
 10 S. Ct. at 2691-92, is as follows:

11 At step one, §3582(c)(2) requires the court to follow the Commission’s
 12 instructions in § 1B1.10 to determine the prisoner’s eligibility for a
 13 sentence modification and the extent of the reduction authorized.
 14 Specifically, § 1B1.10(b)(1) requires the court to begin by “determin[ing]
 15 the amended guideline range that would have been applicable to the
 16 defendant” had the relevant amendment been in effect at the time of the
 17 initial sentencing. “In making such determination, the court shall
 18 substitute only the amendments listed in subsection (c) for the
 19 corresponding guideline provisions that were applied when the defendant
 20 was sentenced and shall leave all other guideline application decisions
 21 unaffected.”

22 At step two of the inquiry, §3582(c)(2) instructs a court to consider any
 23 applicable §3553(a) factors and determine whether, in its discretion, the
 24 reduction authorized by reference to the policies relevant at step one is
 25 warranted in whole or in part under the particular circumstances of the
 26 case. Because reference to §3553(a) is appropriate only at the second step
 27 of this circumscribed inquiry, it cannot serve to transform the proceedings
 28 under §3582(c)(2) into plenary resentencing proceedings.

29 The district court’s discretion at step two is limited. See Freeman v. United States
 30 131 S. Ct. 2685, 2693 (2011) (Noting that “[t]he binding policy statement governing
 31 §3582(c)(2) motions places considerable limits on district court discretion”). In
 32 Freeman, the Supreme Court further explained that “[i]n an initial sentencing hearing,

1 a district court can vary below the Guidelines; but, by contrast, below-Guidelines
 2 modifications in §3582(c)(2) proceedings are forbidden, USSG §1B1.10(b)(2)(A),
 3 except where the original sentence was itself a downward departure [pursuant to]
 4 §1B1.10(b)(2)(B).” Freeman at 2693. As a result, this Court is not permitted to engage
 5 in a de novo resentencing in a § 3582(c)(2) proceeding and therefore cannot grant the
 6 same departures or variances granted at the initial sentencing hearing, unless that
 7 departure was granted pursuant to a government’s motion for substantial assistance as
 8 defined by the Guidelines.³ And the Ninth Circuit recognized the limitation in
 9 § 1B1.10(b)(2)(A). United States v. Davis, 739 F.3d 1222, 1226 (9th Cir. 2014) (Noting
 10 that “[a]lthough the Commission crafted § 1B1.10(b), it is Congress that has made
 11 policy statements available as a general matter and binding on the courts”).

12 The Defendant characterizes § 5G1.3 as an “adjustment” rather than a
 13 “departure.” (Doc. No. 1547 at pg. 6.) U.S.S.G. § 5G1.3(b)(1) and (2) provide that “the
 14 court shall adjust the sentence for any period of imprisonment already served on the
 15 undischarged term of imprisonment if the court determines that such period of
 16 imprisonment will not be credited to the federal sentence by the Bureau of Prisons” and
 17 further provide that “the sentence for the instant offense shall be imposed to run
 18 concurrently to the remainder of the undischarged term of imprisonment.” The Court
 19 agrees that the Guidelines characterize § 5G1.3(b)(1) and (2) for an undischarged term
 20 of imprisonment as an “adjustment” rather than a “departure.”

21 But the Defendant did not have an undischarged term of imprisonment at the time
 22 of sentencing in this case. A careful review of the record shows that the defendant had
 23 already served his state court sentence by the time he was arrested in this case. (See
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25 ³ The commentary to § 1B1.10 defines “substantial assistance” as a government motion under
 26 “§5K1.1 (Substantial Assistance to Authorities) (authorizing, upon government motion, a downward
 27 departure based on the defendant’s substantial assistance); 18 U.S.C. § 3553(e) (authorizing the court,
 28 upon government motion, to impose a sentence below a statutory minimum to reflect the defendant’s
 substantial assistance); and Fed. R. Crim. P. 35(b) (authorizing the court, upon government motion, to
 reduce a sentence to reflect the defendant’s substantial assistance).” U.S.S.G. § 1B1.10 cmt. n.3 (Nov.
 1, 2014).

1 Plea Agreement, Doc. No. 710 at pg. 9). (“The parties will recommend a 1-level
 2 combination of factors departure based, among other things, on the fact that Defendant
 3 was sentenced to 1 year in San Diego County (California) Superior Court case number
 4 SCD231394 for conduct that took place during the conspiracy in this case and
 5 Defendant has already completed that state sentence.”).

6 Since the Defendant’s state court sentence was a discharged term rather than an
 7 undischarged term of imprisonment, the appropriate Guideline section is U.S.S.G.
 8 § 5K2.23, which provides that:

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 10 A downward departure may be appropriate if the defendant (1) has
 11 completed serving a term of imprisonment; and (2) subsection (b) of
 12 §5G1.3 (Imposition of a Sentence on a Defendant Subject to Undischarged
 13 Term of Imprisonment or Anticipated Term of Imprisonment) would have
 14 provided an adjustment had that completed term of imprisonment been
 15 undischarged at the time of sentencing for the instant offense. Any such
 16 departure should be fashioned to achieve a reasonable punishment for the
 17 instant offense.

18 The plain language of § 5K2.23 demonstrates that the Court’s decision to take
 19 into account the Defendant’s discharged state court term of imprisonment is a departure
 20 and not an adjustment. And the Defendant ignores the Court’s other one level § 5K2.0
 21 departure under Cook and Koon at sentencing. In light the record, the Court is not
 22 authorized to consider these departures in a § 3582(c)(2) proceeding because the Court
 23 may only consider, absent a departure arising from a government motion reflecting a
 24 defendant’s substantial assistance as defined in § 1B1.10(b)(2)(B) and § 1B1.10 cmt.
 25 n.3., the amended Guideline range. See United States v. Pleasant, 704 F.3d. 808, 812
 26 (9th Cir. 2013) (Noting that the commentary to § 1B1.10 “was added to resolve a circuit
 27 split that had arisen over whether a defendant’s ‘applicable guideline range’ should be
 derived before or after the application of a departure or variance” and clarifying that the
 amended Guideline range “is derived pre-departure and pre-variance”).

28 With the legal framework in mind, the Court turns to its application to the

1 Defendant's motion to reduce his sentence. In this case, the Court sentenced the
2 Defendant to a custodial term of 87 months after departing downward two levels. The
3 Court granted a one level departure based on the parties' joint recommendation
4 concerning his completed state court sentence, and an additional one level departure
5 under Cook and Koon combination of factors under § 5K2.0 based on the Court's
6 assessment of the Defendant's post-arrest rehabilitation and his participation in the
7 overall conspiracy in relation to the co-defendants. No departures were granted pursuant
8 to a government motion reflecting a defendant's substantial assistance under § 5K1.1
9 or under Fed. R. Crim. P. 35(b) in this matter. At a total offense level of 27 with a
10 criminal history category of III, under Amendment 782, the amended Guideline range
11 for the term of imprisonment in this case is 87 to 108 months. The Defendant's original
12 sentence of 87 months is at the minimum of the amended Guideline range. As a result
13 of the limitation in § 1B1.10(b)(2)(A), the Defendant is not entitled to a reduction of his
14 sentence. Additionally, the Court declines to reduce the Defendant's sentence as a
15 discretionary matter. Accordingly, the Court DENIES the motion to reduce the
16 Defendant's sentence under 18 U.S.C. § 3582(c)(2).⁴

17 IT IS SO ORDERED.

18 DATED: July 23, 2015


19 HONORABLE MARILYN L. HUFF
20 UNITED STATES DISTRICT JUDGE

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⁴ The Court denies the Defendant's motion based on the limitation in § 1B1.10(b)(2)(A). The
28 Sentencing Commission has the authority to amend the limitation to allow the Court to consider other
departures (other than a departure based on a government motion reflecting a defendant's substantial
assistance) in a § 3582(c)(2) proceeding should the Sentencing Commission elect to do so.